Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

No. ——— 78-32

RODNEY DALE REEVES ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court Of The United States

No. ———

RODNEY DALE REEVES ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT

JURISDICTIONAL STATEMENT

The Petitioner, Rodney Dale Reeves, petitions this Court for a Writ of Certiorari to review the final order and Opinion of the Supreme Court of Arkansas entered April 10, 1978, affirming the Judgment of his conviction for the offense of Theft by Receiving (felony) and submits this statement to show that the United States Supreme Court has jurisdiction of this Petition and that a substantial question is presented.

OPINION BELOW

The Opinion of the Supreme Court of Arkansas is reported in 263 Ark. 227, 564 S.W.2d 503 (1978) (Advance Sheets). The Opinion is set forth in Appendix "A" to the Jurisdictional Statement.

JURISDICTION

The Opinion of the Supreme Court of Arkansas was delivered on April 10, 1978, affirming the Judgment of the Sebastian County Circuit Court sentencing Petitioner to ten (10) years in the Department of Corrections and a fine of $10,000.00 on the offense of Theft by Receiving and being a Habitual Criminal. A Petition for Rehearing was filed on April 25, 1978. The rehearing was denied on May 15, 1978. Notice of Appeal and Notice of Filing For Writ of Certiorari to Review was filed on May 15, 1978. A Motion to Stay the Mandate of the Arkansas Supreme Court and to remain on bond was filed in the Arkansas Supreme Court on May 15, 1978. On May 30, 1978, the Arkansas Supreme Court entered an order granting Petitioner's Motion to Stay Mandate and remain on bond pending appeal to or review by certiorari by the United States Supreme Court.

The jurisdiction of the United States Supreme Court to review this decision by petition for Writ of Certiorari or appeal is conferred by 28 U.S.C. §1257.

UNITED STATES CONSTITUTIONAL PROVISIONS, ARKANSAS CONSTITUTIONAL PROVISION, ARKANSAS STATUTES AND RULES INVOLVED

The United States Constitutional Provisions involved are Amendments 6 and 14 and can be found in U.S.C.A., Constitution, Amendment 6 to 14, page 223.

Amendment 6 provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defense.

Amendment 14 provides as follows:

> * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of law.

The Arkansas Constitutional provision involved is Article 2, Section 10 which can be found in Volume 1, page 33 of Arkansas Statutes Annotated (Official Edition).

Article 2, Section 10 provides as follows:

> In all criminal prosecutions the accused shall enjoy the right * * * to be heard by himself and his counsel.

The Arkansas Statutes involved are *Ark. Stat. Ann.* Sections 43-603, 604, 605, 606, 618, 619 and 43-1203. These statutes can be found in Volume 4A at pages 30-35 and page 114.

Ark. Stat. Ann. Sections 43-603, 604, 605, and 606 provide as follows:

> 43-603. Preliminary examination. Where the arrest is made in the county in which the offense is charged to have been committed, the magistrate before whom the defendant is carried, shall forthwith proceed to an examination of the charge; and, if the offense charged be a felony, shall commit, hold to bail or discharge, as the case may be; or, if he have jurisdiction to hear and finally try the charge, shall proceed to final determination and judgment therein.
>
> 43-604. Authority of Magistrate. A magistrate of the county in which a public offense has been commit-

ted, is authorized to examine the charge, and commit to jail or hold to bail the person charged with its commission.

43-605. Procedure. When a person, who has been arrested, shall be brought, or in pursuance of a bail-bond shall come, before a magistrate of the county in which the offense is charged to have been committed, the charge shall be forthwith examined; reasonable time, however, being allowed for procuring counsel and the attendance of witnesses. The magistrate before commencing the examination, shall state the charge and inquire of the defendant whether he desires the aid of counsel, and shall allow a reasonable opportunity for procuring it.

43-606. Subpoenas. The magistrate shall issue subpoenas for witnesses either for or against the defendant, which shall be executed by a peace officer, and shall coerce their attendance by the same process as in the circuit courts.

Ark. Stat. Ann. Sections 43-618 and 43-619 provide as follows:

43-618. When Defendant Discharged. When the examination is closed, if the magistrate is of opinion that there is not sufficient cause for believing that the defendant has committed a public offense, he shall discharge the defendant from custody, and make an entry thereof on the minutes.

43-619. When held for trial. If however, the magistrate is of opinion, from the examination, that there are reasonable grounds to believe the defendant guilty of the offense charged, he shall be held for trial,

and committed to jail, or discharged on (on) bail, if the offense be bailable.

Ark. Stat. Ann. Section 43-1203 provides as follows:

43-1203. Assignment of counsel. If any person about to be arraigned upon an indictment for a felony, be without counsel to conduct his defense, and shall be unable to employ any, it shall be the duty of the court to assign him counsel, at his request, not exceeding two (2) who shall have free access to the prisoner at all reasonable hours.

The Rules of Criminal Procedure involved are Rules 8.1, 8.2, and 8.3 of the Arkansas Rules of Criminal Procedure and can be found in Volume 4A at pages 451-452.

Rule 8.1 provides as follows:

Prompt First Appearance. An arrested person who is not released by citation or by other lawful manner shall be taken before a judicial officer without unnecessary delay.

Rule 8.2 provides as follows:

Appointment of Counsel.

(a) An accused's desire for, and ability to retain, counsel should be determined by a judicial officer before the first appearance, whenever practicable.

(b) Whenever an indigent accused is charged with a criminal offense and upon being brought before any court, does not knowingly and intelligently waive the appointment of counsel to represent him, the court shall appoint counsel to represent him unless he is charged with a misdemeanor and the court has de-

termined that under no circumstances will imprisonment be imposed as a part of the punishment if he is found guilty.

(c) Attorneys appointed by municipal courts, city courts, police courts, and justices of the peace may receive fees for services rendered upon certification by the presiding judicial officer if provision therefor has been made by the county or municipality in which the offense is committed or the services are rendered.

Rule 8.3 provides as follows:

Nature of First Appearance.

(a) Upon the first appearance of the defendant the judicial officer shall inform him of the charge. The judicial officer shall also inform the defendant that:

(i) he is not required to say anything, and that anything he says can be used against him;

(ii) he has a right to counsel; and

(iii) he has a right to communicate with his counsel, his family, or his friends, and that reasonable means will be provided for him to do so.

(b) No further steps in the proceedings other than pretrial release inquiry may be taken until the defendant and his counsel have had an adequate opportunity to confer, unless the defendant has intelligently waived his right to counsel or has refused the assistance of counsel.

(c) The judicial officer, if unable to dispose of the case at the first appearance, shall proceed to decide the question of the pretrial release of the defendant. In

so doing, the judicial officer shall first determine by an informal, non-adversary hearing whether there is probable cause for detaining the arrested person pending further proceedings. The standard for determining probable cause at such hearing shall be the same as that which governs arrests with or without a warrant.

QUESTION PRESENTED

1. Does the opinion and decision of the Arkansas Supreme Court affirming the judgment of the Sebastian County Circuit Court deprive the Petitioner of his right to counsel at a critical stage in the proceedings when he was denied appointed counsel at his preliminary hearing in the Fort Smith Municipal Court?

STATEMENT

Petitioner, Rodney Dale Reeves, was charged by information filed in Sebastian County Circuit Court on November 17, 1976, with Theft by Receiving in violation of *Ark. Stat. Ann.* §41-2206, a Class "C" felony, and for being a Habitual Criminal, Acts No. 280 of 1975, S 1001 (a section now superseded by Act 474 of 1977, §4; *Ark. Stat. Ann.* §41-1001, Repl. 1977). The information alleged that petitioner on August 27, 1976, received a stolen 1973 Volkswagen automobile, the property of Dr. W. Ely Brooks.

On October 15, 1976, an information was filed in Fort Smith Municipal Court charging Petitioner with the offense of theft by receiving and an arrest warrant was issued thereon. On October 16, 1976, Petitioner appeared in Municipal Court (examining Court), was arraigned, found to be indigent, was assigned the Public Defender as counsel, and preliminary hearing was set for November 1, 1976.

On October 27, 1976, the Sebastian Prosecuting Attorney filed a petition for a hearing on Petitioner's indigency status to determine if he was entitled to assigned counsel. On November 1, 1976, a hearing was held in Municipal Court on petitioner's indigency status. He was represented at this hearing by the Public Defender. The Municipal Court found petitioner not to be indigent, directed that he retain counsel of his choice and rescheduled the preliminary hearing for November 8, 1976, later reset for November 16, 1976, to give Petitioner more time to hire counsel.

On November 16, 1976, Petitioner appeared without counsel and advised the court he did not have the funds to hire an attorney. The Municipal Court held the preliminary hearing and Petitioner was not represented by counsel. No Motion to Suppress evidence was filed. Petitioner was given

the right to cross-examine witnesses, and given the opportunity to testify (he declined). The State was represented by the Prosecuting Attorney, it presented witnesses, and Petitioner was bound over to Circuit Court for trial.

On March 24, 1977, Maupin Cummings, Circuit Judge on Exchange, found the Petitioner to be indigent and appointed the Public Defender to represent him at trial. The Public Defender advised the court of a conflict of interest and on April 7, 1977, the Circuit Court appointed a private member of the Arkansas Bar Association to represent Petitioner at his trial.

On April 7, 1977, appointed counsel filed a Motion in Circuit Court with Affidavit attached, requesting another preliminary hearing where Petitioner would have the assistance of counsel. On April 22, 1977, a hearing was held on the motion, testimony was presented, arguments made and the Circuit Court denied the Motion.

Trial was held on April 26-27, 1977, and Petitioner was found guilty and given the maximum sentence of ten (10) years and a fine of $10,000.00 by the jury. Judgment was entered by the trial court on the verdict of the jury and Petitioner perfected an Appeal to the Arkansas Supreme Court.

On April 10, 1978, the Arkansas Supreme Court delivered its opinion and decision affirming the judgment of the Sebastian County Circuit Court. The Supreme Court held that Petitioner had failed to show any prejudice by reason of the denial of counsel at his preliminary hearing.

Petitioner petitions this Court for a Writ of Certiorari to review the final judgment of the Arkansas Supreme Court.

ARGUMENT

Petitioner believes that the question presented herein is substantial and requires plenary consideration and warrants briefs on the merits and oral argument for resolution of the question. The reason the question is substantial is set out below.

The opinion of the Supreme Court of Arkansas holding that counsel was not required at a critical stage in the proceedings (preliminary hearing) has confused the holdings of this Court in *Coleman v. Alabama,* 399 U.S. 1, 90 S.Ct. 1999, 26 L. Ed. 2d 387 (1970) and *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L. Ed. 2d 54 (1975).

In order to present this contention of confusion by the Arkansas Supreme Court in applying these two cases it is necessary to discuss general legal principles and the principles of the two cases as they apply to the Arkansas procedure.

An accused charged with a criminal offense has the right to counsel. *Powell v. Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L. Ed. 158 (1932). Amendment 6 to the *United States Constitution* and Article 2, Section 10 of the *Arkansas Constitution* provide that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense. See, 21 Am. Jur. 2d *Criminal Law,* Section 318, page 347. If the accused cannot afford his own privately retained counsel he is entitled to the appointment of an attorney. *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L. Ed. 2d 799 (1963) and *Argersinger v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006, 32 L. Ed. 2d 530 (1972).

The pertinent statute concerning assignment of counsel is *Ark. Stat. Ann.* Section 43-1203. It provides that the court

has a duty to appoint counsel if an accused is not able to employ his own attorney. The applicable rule concerning appointment of counsel is Rule 8.2 of the Arkansas Rules of Criminal Procedure.

A probable cause hearing for an arrested person is provided for in Rule 8.3 of the Arkansas Rules of Criminal Procedure which sets out the nature of an arrested person's first appearance before a magistrate. A preliminary examination or hearing is provided for in *Ark. Stat. Ann.* Sections 43-601 to 43-631.

Amendments 4 and 14 to the *United States Constitution* require a probable cause hearing for arrested persons. *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L. Ed. 2d 54 (1975). The holding of a preliminary hearing in Arkansas under our applicable statutes (*Ark. Stat. Ann.* Sections 43-601 — 43-631) is discretionary. *Ellingberg v. State,* 254 Ark. 199, 492 S.W.2d 904 (1973). However, if one is held, the defendant is entitled to counsel as it is a critical stage in the proceedings. *Graves v. State,* 256 Ark. 117, 505 S.W.2d 748 (1974), citing *Coleman v. Alabama,* 399 U.S. 1, 90 S.Ct. 1999, 26 L. Ed 2d 387 (1970).

Now, we come to the point where the Arkansas Supreme Court has confused this Court's holdings in *Coleman* and *Gerstein.*

Rule 8.2 of the Arkansas Rules of Criminal Procedure appears to require the assignment of counsel to indigents at their first appearance in court after being arrested. However, Rule 8.3 of the Arkansas Rules of Criminal Procedure provides that the nature of the first appearance in court is that the judicial officer shall first determine by an informal, nonadversary hearing whether there is probable cause for detaining the arrested person pending further proceedings.

This hearing is required by the Fourth Amendment to the United States Constitution, but is not a critical stage in the prosecution that would require appointed counsel because it is of a non-adversary character. *Reeves v. State,* 261 Ark. 384, 548 S.W.2d 822 (1977), citing *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L. Ed. 2d 54 (1975) (The same Rodney Dale Reeves as herein and the same proceedings). Petitioner can agree with this limited holding concerning the application of Rule 8.3. However, the proceedings in this case developed further than the *mere* probable cause hearing.

These proceedings developed to the preliminary hearing stage of the proceedings as provided for in *Ark. Stat. Ann.* Sections 43-605 to 43-631. This preliminary hearing stage of the proceedings is a critical stage in the prosecution in Arkansas and would require the appointment of counsel. *Graves v. State,* 256 Ark. 117, 505 S.W.2d 748 (1974), citing *Coleman v. Alabama,* 399 U.S. 1, 90 S.Ct. 1999, 26 L. Ed. 2d 387 (1970).

The preliminary examination is a formal hearing as it is in Alabama. *Ark. Stat. Ann.* Section 43-605 provides that an accused has the right to the aid of counsel; *Ark. Stat. Ann.* Section 43-606 provides that the magistrate shall issue subpoenas for or against the defendant; *Ark. Stat. Ann.* Section 43-607 limits the number of witnesses; *Ark. Stat. Ann.* Section 43-608 provides for continuances; *Ark. Stat. Ann.* Sections 43-615 and 43-616 provide for the exclusion and separation of witnesses from the courtroom; *Ark. Stat. Ann.* Section 43-617 provides that the names and residences of witnesses be stated by the magistrate; *Ark. Stat. Ann.* Section 43-618 provides that the defendant will be discharged if the magistrate is of the opinion that there is not sufficient

cause for believing the defendant has committed a public offense; *Ark. Stat. Ann.* Section 43-619 provides that if the magistrate is of the opinion that there are reasonable grounds to believe the defendant guilty of the offense charged he shall be held for trial; *Ark. Stat. Ann.* Section 43-621 provides for commitment to jail or bail after examination; and, *Ark. Stat. Ann.* Sections 43-626 — 43-627 provide for the preservation of the preliminary hearing testimony for possible use later under certain circumstances.

It can be seen that this is a fomal, *critical stage* in the proceedings. Although it is similar to a probable cause hearing, it is a subsequent, formal, adversary type proceeding that requires counsel under the 6th and 14th Amendments to the *United States Constitution* and Article 2, Section 10 of the Arkansas Constitution because it is a critical stage in the prosecution. (*Coleman v. Alabama, supra*).

The Fourth Amendment does not require counsel at a probable cause hearing. (*Gerstein v. Pugh, supra*). The Sixth and Fourteenth Amendments require counsel at a preliminary hearing. (*Coleman v. Alabama, supra*). The Supreme Court of Arkansas has confused the two proceedings and denied Petitioner his right to appointed counsel at this critical stage in the proceedings.

In this critical stage in the prosecution, if the Petitioner had been provided counsel, he could have filed and presented a Motion to Suppress evidence, made an intelligent decision on whether to testify or not, and made inquiries in line with the reasons set out in *Coleman, supra.* Petitioner was denied this right by all tiers of the Arkansas Courts. (Municipal, Circuit and Supreme) The right should not be denied by this Court.

CONCLUSION

Petitioner submits that for the above reasons jurisdiction should be noted and the Petition accepted for decision.

Respectfully submitted,

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APPENDIX "A"

RODNEY DALE REEVES V. STATE OF ARKANSAS

CR-77-220

Opinion delivered April 10, 1978
(Division I)

Appeal from
Sebastian Circuit Court, Fort Smith District

JOHN HOLLAND, Judge; Affirmed
GEORGE ROSE SMITH, Justice

The appellant was charged with the theft of a 1973 Volkswagen car by receiving — an offense that is essentially what was formerly known as receiving stolen property. Ark. Stat. Ann. §41-2206 (Repl. 1977). Upon trial by jury he was found guilty and was sentenced, as a habitual offender, to 10 years' imprisonment and to a $10,000.00 fine. Several points for reversal are argued by court-appointed counsel.

The State's proof showed that on the night of August 27, 1976, the appellant Reeves and Mike Lovell, a police informant, drove together in Reeves's car from Fort Smith to Fayetteville for the purpose of stealing a Volkswagen. In Fayetteville the two men found a car of the kind that Reeves wanted. Lovell actually stole the car and followed Reeves back to Fort Smith. There they drove the Volkswagen into a garage next to Reeves's residence and used specialized tools to remove the several V.I.N.'s (vehicle identification numbers) from the stolen car. Lovell was paid $150 for his assistance when he left at about dawn. The police obtained a search warrant and searched the premises, finding the vehicle in question and several other

Volkswagens from which the V.I.N's had been similarly removed.

It is first argued that the court should have granted a defense motion for a month's continuance and a defense motion for a second preliminary hearing. Our difficulty with respect to both motions arises from the absence of any *facts* tending to show why the court abused its discretion in denying the motions.

Neither motion was supported by the proffer of testimony. Counsel simply argued that 18 days was not sufficient time for him to prepare the case for trial and that a second preliminary hearing should be ordered because Reeves, as a result of having been found not to be an indigent, was not represented by counsel at the first preliminary hearing. It is argued here, as it was in the court below, that the issues in the case were so complex that it could not be properly prepared for trial in 18 days and that evidence favorable to Reeves might have been developed at a second preliminary hearing. We have, however, no facts to go on except the record of the actual trial as abstracted by counsel. That record indicates that Reeves received a fair trial and was well represented. In matters of this kind, turning essentially upon the many practical considerations that must be taken into account in setting a case for trial, we must depend upon the sound judgment of the trial court unless a clear abuse of discretion is made to appear. That showing has not been made in this case.

It is next argued that the court should not have allowed the State to prove Reeves's commission of other offenses; that is, that the officers found on Reeves's premises other Volkswagens from which the V.I.N.'s had been removed. The State did not actually try to show that the other ve-

hicles had been stolen, though no doubt the jury so inferred. Even so, the proof was admissible as tending to show Reeves's knowledge that the 1973 Volkswagen in question had been stolen. Evidence of other crimes may be admissible to show knowledge. Ark. Stat. Ann. §28-1001, Rule 404 (b) (Supp. 1977). It makes no difference that the prosecution had already shown by a witness that Reeves had participated in the theft of the Volkswagen. The State was entitled to prove its case as conclusively as it could. That Reeves possessed other vehicles from which the V.I.N.'s had been removed in a similar manner was competent evidence to suggest to the jury that he had so removed the V.I.N.'s from the Volkswagen in question for the purpose of preventing its possible identification as stolen property; in short, he must have known that it was stolen.

Third, the appellant questions the admissibility of the State's proof of previous convictions under the habitual criminal statute. Three of the four convictions that were proved showed that the sentences had been suspended. It is argued that such a judgment is not a "conviction" within the meaning of the habitual criminal law.

In *Rogers v. State,* 260 Ark. 232, 538 S.W.2d 300 (1976), we held that under the habitual criminal statute in effect in 1975, a judgment imposing a suspended sentence was admissible as a conviction. Act 228 of 1953, as amended. That statute was superseded by the Criminal Code, which became effective on January 1, 1976, under which the case at bar was tried. Act 280 of 1975, §1001 (a section now in turn superseded by Act 474 of 1977, §4; Ark. Stat. Ann. §41-1001 [Repl. 1977]). We do not see, however, any such difference between the language of the statute construed in the *Rogers* case and that of the 1975 Code as to indicate a

change in the legislative intention. On this point counsel for the appellant argues that in *Rogers* we relied in part upon a reference in the 1953 statute's emergency clause to "persons *committing* more than one felony," a phrase not to be found in the 1975 Code. The Code, however, was a comprehensive act made up of hundreds of sections. There was no reason for the legislature to repeat the quoted phrase in its emergency clause. There is, however, a reason for us to hold, as we do, that if the legislature meant for its earlier language to include judgments imposing a suspended sentence, as we decided in *Rogers,* then the legislature had the same intention in re-enacting substantially the same language in the Criminal Code. It may be noted, in passing, that the 1977 statute, not applicable to this case, may have adopted the view now urged upon us by this appellant. See Ark. Stat. Ann. §41-1001 (Repl. 1977).

It is also argued that the State's proof of two previous convictions, both in Sebastian Circuit Court, was inadmissible, because the circuit clerk's testimony about them was based upon the court's docket entries. It is true that a docket notation is not the entry of a final judgment. *Herrod v. Larkins,* 183 Ark. 509, 36 S.W.2d 667 (1931). The habitual criminal law applicable to this case provides, however, that a previous conviction may be proved by any evidence that satisfies the trier of fact that the defendant was convicted. Act 280 of 1975, §1003. Under the Uniform Rules of Evidence, preliminary questions about the admissibility of evidence are decided by the trial court. Ark. Stat. Ann. §28-1001, Rule 104 (a) (Supp. 1977). Under Rule 803 (8) of those rules, a record of a public office setting forth its regularly conducted and regularly recorded activities is not hearsay (which was the objection made in the trial court). Here the trial court decided that the testimony of its own

clerk, based upon its own docket entries, was proper for the jury's consideration. The Uniform Rules of Evidence are to be construed to the end that the truth may be ascertained and proceedings justly determined. Rule 102. Here there is no suggestion whatever that the docket entries did not correctly reflect the court's judgments in the earlier cases in which Reeves was convicted. We find no sound basis for saying that the trial judge's ruling was wrong.

Other minor points are argued, but they are without merit.

Affirmed.

We agree. Harris, C.J., and Hickman and Howard, JJ.

APPENDIX "B"

RODNEY DALE REEVES V. STATE OF ARKANSAS

CR-77-220

NOTICE OF FILING FOR
WRIT OF CERTIORARI TO REVIEW

Comes the Appellant-Petitioner, Rodney Dale Reeves, and hereby gives notice of filing for Writ of Certiorari to review the final decision and opinion delivered on April 10, 1978, by the Arkansas Supreme Court affirming the Judgment of the Sebastian County Circuit Court, dated April 26, 1977, and designates the entire Judgment, Opinion and Decision of the Arkansas Supreme Court to be reviewed by Certiorari.

The review by Certiorari is taken to the United States Supreme Court under the provisions of 28 U.S.C. §1257(3).

/s/ Robert S. Blatt

CERTIFICATE OF SERVICE

I, Robert S. Blatt, hereby certify that I have served a copy of the foregoing Notice of Filing for Writ of Certiorari to Review on the Attorney General by mailing a copy of same to Honorable Bill Clinton, Justice Building, Little Rock, Arkansas 72201.

/s/ Robert S. Blatt

Filed on May 15, 1978, in the Arkansas Supreme Court.

APPENDIX "C"

RODNEY DALE REEVES V. STATE OF ARKANSAS

CR-77-220

NOTICE OF APPEAL

Comes the Defendant-Appellant, Rodney Dale Reeves, and hereby gives notice of appeal from the decision and opinion delivered on April 10, 1978, by the Arkansas Supreme Court, affirming the Judgment of the Sebastian County Circuit Court, Fort Smith District, dated April 26, 1977, and designates the entire Judgment, Opinion and Decision of the Arkansas Supreme Court as appealed from.

The appeal is taken to the United States Supreme Court under the provisions of 28 U.S.C. §1257.

/s/ Robert S. Blatt

CERTIFICATE OF SERVICE

I, Robert S. Blatt, hereby certify that I have mailed a copy of this Notice of Appeal to Appellee, State of Arkansas, by mailing a copy to its counsel of record, Attorney General of Arkansas, by depositing same in the United States Post Office, with first class postage, prepaid, to this address, Justice Building, Little Rock, Arkansas 72201.

/s/ Robert S. Blatt

Filed on May 15, 1978, in the Arkansas Supreme Court.

Supreme Court, U. S.
FILED
OCT 19 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 19__

No. 78-321

Rodney Dale Reeves ..... *Petitioner*

vs.

State of Arkansas ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

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Req. No. 78-5226

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Pointer v. *State of Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) 9

United States v. *Bartlett*, 449 F. 2d 700 (8th Cir. 1971), cert. denied 405 U.S. 932, 92 S. Ct. 990, 30 L. Ed. 2d 808 (1972) 9

United States v. *Garcia*, 555 F. 2d 708 (9th Cir. 1977) 9

ARKANSAS RULES OF CRIMINAL PROCEDURE

Rule 17.1 2

ARKANSAS CONSTITUTION

Article 2, § 10 4

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 19____

No. _____

Rodney Dale Reeves ..... *Petitioner*

vs.

State of Arkansas ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at 263 Ark. 227, 564 S.W. 2d 503 (1978) and is reproduced in the appendix to the petition for certiorari at page 15.

JURISDICTION

The Supreme Court of the United States has jurisdiction over this matter under 28 U.S.C. §1257 (3).

QUESTION PRESENTED

Whether the opinion of the Arkansas Supreme Court affirming the judgment of the Sebastian County Circuit Court

deprives the petitioner of his right to counsel at a critical stage in the proceedings when he was denied appointed counsel at his preliminary hearing in the Fort Smith Municipal Court?

STATEMENT OF THE CASE

The statement of this case is properly and accurately set forth in the petition for certiorari.

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

RULE 17. DISCLOSURE TO DEFENDANT

RULE 17.1 Prosecuting Attorney's Obligations.

(a) Subject to the provisions of Rules 17.5 and 19.4, the prosecuting attorney shall disclose to defense counsel, upon timely request, the following material and information which is or may come within the possession, control, or knowledge of the prosecuting attorney:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial;

(ii) any written or recorded statements and the substance of any oral statements made by the defendant or a codefendant;

(iv) any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations, scientific tests, experiments or comparisons;

(v) any books, papers, documents, photographs or tangible objects, which the prosecuting attorney intends to use in any hearing or at trial or which were obtained from or belong to the defendant; and

(vi) any record of prior criminal convictions of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial, if the prosecuting attorney has such information.

(b) The prosecuting attorney shall, upon timely request, inform defense counsel of:

(i) the substance of any relevant grant jury testimony;

(ii) whether, in connection with the particular case, there has been any electronic surveillance of the defendant's premises or of conversations to which he was a party;

(iii) the relationship to the prosecuting authority of persons whom the prosecuting attorney intends to call as witnesses.

(c) The prosecuting attorney shall, upon timely request, disclose and permit inspection, testing, copying, and photocopying of any relevant material regarding:

(i) any specific searches and seizures;

(ii) the acquisition of specified statements from the defendant.

(d) Subject to the provisions of Rule 19.4, the prosecuting attorney shall, promptly upon discovering the matter, disclose

to defense counsel any material or information within his knowledge, possession, or control, which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefor.

Arkansas Constitution, Art. 2 §10

In all criminal prosecutions the accused shall enjoy the right . . . to be heard by himself and his counsel.

ARGUMENT

I.

WHETHER THE OPINION OF THE ARKANSAS SUPREME COURT AFFIRMING THE JUDGMENT OF THE SEBASTIAN COUNTY CIRCUIT COURT DEPRIVES THE PETITIONER OF HIS RIGHT TO COUNSEL AT A CRITICAL STAGE IN THE PROCEEDINGS WHEN HE WAS DENIED APPOINTED COUNSEL AT HIS PRELIMINARY HEARING IN MUNICIPAL COURT?

Petitioner, Rodney Dale Reeves, was charged by information dated November 17, 1976, with theft by receiving in violation of Ark. Stat. Ann. § 41-2206 (Crim. Code 1975), and was further charged under the Habitual Criminal Act, Act 280 of 1975. Prior to being charged in circuit court, an information was filed in the Fort Smith, Arkansas Municipal Court. The petitioner appeared in Municipal Court on October 16, 1976, was arraigned, found to be indigent, and was assigned the Public Defender as counsel.

Subsequently, on October 27, 1976, a hearing was requested by the prosecutor to further consider the petitioner's status as an indigent. Such hearing was held on November 1, 1976, at which time the petitioner appeared accompanied by counsel. The municipal court found the petitioner not to be indigent and his appointed counsel was dismissed. Petitioner's preliminary hearing was delayed for two weeks in order to allow him time to retain counsel.

The petitioner appeared before the municipal court, without counsel, for his preliminary hearing on November 16,

1976. The hearing resulted in the petitioner's being bound over to Sebastian County Circuit Court on the aforementioned felony charges. Prior to petitioner's trial, the Sebastian County Circuit Court found petitioner to be indigent and appointed counsel to represent him. Petitioner now alleges that in view of the fact that he was found to be indigent by the circuit court, he should have received the benefit of appointed counsel at his preliminary hearing, and that failure to receive such services of counsel constitutes prejudicial error.

In *Coleman* v. *Alabama*, 399 U.S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970), this Court held that the Alabama preliminary hearing is a critical stage of the state's criminal process at which the accused is entitled to the assistance of counsel. The petitioner herein contends that he was denied the assistance of counsel at his preliminary hearing in violation of this Court's decision in *Coleman* v. *Alabama*, *supra*, and that such denial hindered the preparation of his defense. For the reasons hereinafter stated, respondent submits that the petitioner was not denied the right to counsel, nor was he prejudiced by his lack of counsel at the preliminary hearing.

This Court's decision in *Coleman* v. *Alabama*, *supra*, does not mandate the presence of counsel at the preliminary hearing, it merely requires that an indigent accused be afforded the right to counsel. As is evident from the record the petitioner herein was not indigent at the time of his preliminary hearing nor was he denied the right to counsel.

Subsequent to petitioner's original appearance in municipal court at which he was found to be indigent, he appeared in Sebastian County Circuit Court for an indigency hearing in an unrelated case. At such hearing, evidence was

presented to the effect that the petitioner had received in excess of twelve thousand dollars ($12,000) for services rendered unto a construction company between January and October of 1976. In addition, it was revealed that the petitioner was the owner of seven (7) automobiles. [See Appendix "B"] As a result of such testimony, the state requested a full hearing on petitioner's indigency status in the present case.

At the November 1, 1976 hearing in municipal court the petitioner, who was at that time represented by the Public Defender, testified that he currently had money on his person. Upon request, the petitioner displayed twelve one-hundred dollar bills and some smaller bills in open court. [See Appendix "A"] As a result of the hearing, the examining court found petitioner not to be indigent and his appointed counsel was dismissed.

A strong presumption of validity attaches to findings made by a court of competent jurisdiction. *Coleman* v. *State*, 257 Ark. 538, 518 S.W. 2d 487 (1975); *Norrell* v. *Coulter*, 218 Ark. 870, 239 S.W. 2d 280 (1951). Thus, in the present case, the municipal court's finding that the petitioner was not indigent is presumed to be correct.

Subsequent to the municipal court's November 1, 1976 determination that the petitioner was not indigent, the preliminary hearing which had originally been scheduled for that date was rescheduled to November 8, 1976 in order to allow the petitioner time to retain counsel of his choosing. (T. 83) At the petitioner's request, the preliminary hearing date was again delayed until November 16 to allow the petitioner more time to retain counsel if he so desired. (T. 83-84) On November 16,

1976, the petitioner appeared at the preliminary hearing without counsel, and the court proceeded with the hearing.

Article 2 § 10 of the Arkansas Constitution provides that an accused in a criminal prosecution shall enjoy the right to be heard by himself and his counsel. Arkansas cases have clearly recognized the right of an accused to conduct his own defense if he so elects. *Barnes* v. *State*, 258 Ark. 565, 528 S.W. 2d 370 (1975). The law does not provide that an accused person must have counsel in a preliminary examination. That is a privilege which he may or may not take advantage of as he chooses. *Phillips* v. *State*, 162 Ark. 541, 547, 258 S.W. 403 (1924). Thus, in view of the fact that the petitioner had been found not to be indigent, coupled with the aforementioned authorities, the petitioner was deprived of no constitutional rights by the court's proceeding with his preliminary hearing without the assistance of counsel.

Respondent further notes that at least one federal court has held that the proper method for the redress of alleged infirmities in preliminary proceedings is through intervention by habeas corpus or mandamus prior to trial. See, *Blue* v. *United States*, 342 F. 2d 894 (D.C. Cir. 1965), cert. denied 380 U.S. 944, 85 S. Ct. 1029, 13 L. Ed. 2d 964 (1965). The record discloses that no such remedy was sought by petitioner in regard to his alleged denial of counsel at his preliminary hearing.

Even if error had occurred in proceeding with the preliminary hearing without the petitioner being represented by counsel, such error must be prejudicial to the accused's substantial rights, including the preparation of his defense, before relief will be granted. *Hansen* v. *United States*, 393 F. 2d 763 (8th Cir. 1968), cert. denied 393 U.S. 833, 89 S. Ct. 103, 21 L. Ed. 2d

103 (1968); *United States* v. *Garcia*, 555 F. 2d 708 (9th Cir. 1977). The burden is on the accused to demonstrate that prejudicial error has been committed. *United States* v. *Bartlett*, 449 F. 2d 700 (8th Cir. 1971), cert. denied 405 U.S. 932, 92 S. Ct. 990, 30 L. Ed. 2d 808 (1972). In the present case the petitioner has failed to demonstrate any prejudice resulting from his lack of counsel, as evidenced by the opinion of the Arkansas Supreme Court. [See petitioner's Appendix "A"]

The petitioner alleges that had he been provided counsel, he could have filed and presented a motion to suppress evidence; could have made an intelligent decision as to whether he should testify; and could have made inquiries in line with the reasons set out in *Coleman* v. *Alabama*, *supra*.

The record clearly reveals that petitioner's trial counsel filed a motion to suppress evidence proper to trial and that a full hearing was held on such motion. (T. 13, 89 *et seq.*) Further, the petitioner elected not to testify at the preliminary hearing and thus, nothing said by him at that time could be used against him at trial. Even if the petitioner had testified at the hearing, such testimony could not have been used against him at trial. *Pointer* v. *State of Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) bars the admission of testimony given at a pre-trial proceeding where the accused did not have the benefit of cross-examination by and through counsel.

The *Coleman* inquiries referred to by the petitioner are set out at 399 U.S. 9 as follows:

> First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to

bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital imprachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.

The aforementioned concerns of this Court were rendered moot in the present case by the petitioner's use of Arkansas' rather liberal pre-trial discovery provisions set out in Rule 17.1 of the Arkansas Rules of Criminal Procedure. The record indicates that the petitioner filed a motion to compel discovery prior to trial. (T. 10) Subsequent to the discovery motion, the petitioner filed motions in limine to prevent the introduction of evidence of other offenses committed by the petitioner and also to prevent the introduction of certain items which had been seized by the state. (T. 18, 21) The petitioner also filed an additional motion for exculpatory materials. (T. 23)

At petitioner's April 7, 1977, pre-trial hearing, the State's open-file policy was made known to the trial court by petitioner's counsel. (T. 49, 50) A full hearing was held on petitioner's motion for discovery on April 22, 1977, in the Sebastian County Circuit Court. (T. 53 *et seq.*) At such hearing, petitioner's counsel stated to the trial court that he had investigated the prosecution's files. (T. 56, 57) The remainder of

the hearing was used to complete the discovery process and to rule on petitioner's motions in limine.

The petitioner has failed to affirmatively state any actual prejudice which resulted from his appearance at the preliminary hearing unaccompanied by counsel. As stated by the Arkansas Supreme Court in its opinion below, there were no facts tending to show that the trial court abused its discretion in denying the petitioner's motion for a second preliminary hearing, and the record indicates that Reeves received a fair trial and was well represented. 263 Ark. at 229.

In sum, the petitioner was properly found by the examining court not to be indigent prior to his preliminary hearing. As stated by the Arkansas Supreme Court, in matters of this kind we must depend upon the sound judgment of the trial court unless a clear abuse of discretion in making its determination has been shown. That showing has not been made in this case. 263 Ark. at 230. Even the speculative prejudice alleged by the petitioner in the instant case is to no avail, as those areas of concern were rendered moot by the petitioner's use of the pre-trial discovery procedures. Thus, in view of petitioner's election to appear before the municipal court unaccompanied by counsel, coupled with his failure to demonstrate any actual resultant prejudice, his petition should be denied by this Court.

CONCLUSION

For the aforementioned reasons and authorities, the respondent requests that petitioner's application for a Writ of Certiorari be denied, for his allegations are without support in fact or in law.

Respectfully sumbitted,

BILL CLINTON
Attorney General

By: JESSE L. KEARNEY
Assistant Attorney General
JUSTICE BUILDING
LITTLE ROCK, ARKANSAS 72201

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Jesse L. Kearney, Assistant Attorney General, do hereby certify that a copy of the foregoing Brief for Respondent in Opposition has been served upon petitioner by placing three (3) copies of the same in the United States Mail, postage prepaid to Robert S. Blatt, Attorney at Law, P. O. Box 1825, Fort Smith, Arkansas 72012, attorney for petitioner, on this 18 day of October, 1978.

JESSE L. KEARNEY
Assistant Attorney General

APPENDIX "A"

AFFIDAVIT

Comes now Ron Fields and being first duly sworn states upon oath:

My name is Ron Fields and I am a Deputy Prosecuting Attorney for the Twelfth Judicial Circuit, State of Arkansas. I was present during a hearing on Rodney Dale Reeves in CR 74-47 during which time there was testimony that Rodney Dale Reeves had been paid approximately $26,000.00 over a period of around one year for brick work by a local company. Based upon these facts I requested an indigency hearing be held in the Fort Smith Municipal Court on the cases that were then pending in that court against Rodney Reeves. (See attached exhibits) During the course of that hearing Rodney Reeves, represented by the Public Defender, took the witness stand on his own behalf and testified. During cross-examination I inquired of Mr. Reeves if he currently had money on his person. The question was prompted by the fact that we had received information that Reeves habitually carried fairly large sums of money. Reeves at that time stated he did and on a further request that he count out the money for the Court displayed twelve one-hundred dollar bills and some smaller bills. At the conclusion of the hearing the Judge found that Rodney Reeves was not an indigent.

/s/ Ron Fields
RON FIELDS, Affiant

Subscribed and sworn to before me this 10th day of October, 1978.

/s/ Lynda Ray
Notary Public

My Commission expires:
July 1, 1979

APPENDIX "B"

IN THE MUNICIPAL COURT
OF SEBASTIAN COUNTY
FORT SMITH DISTRICT

STATE OF ARKANSAS — PLAINTIFF

VS.

RODNEY DALE REEVES — DEFENDANT

PETITION FOR HEARING ON INDIGENCY STATUS OF RODNEY DALE REEVES

Comes now Charles Karr, Prosecuting Attorney in and for the Twefith Judicial Circuit, State of Arkansas, and moves the Court that a hearing be held to determine whether or not Rodley Dale Reeves is an indigent and as grounds for the motion alleges and states:

I.

That Rodney Dale Reeves is currently charged in this Court with the offense of Theft by Receiving, a felony.

II.

That on October 15, 1976, Rodney Dale Reeves was arraigned on the Theft by Receiving charge in the Fort Smith Municipal Court and stated at that time before the Bench that he did not have funds to hire an attorney with. That the Court at that time appointed a public defender to represent Mr. Reeves.

III.

That on October 15, 1976, a hearing was held in the Sebastian County Circuit Court concerning the indigency status of Rodney Dale Reeves in Circuit Case No. 74-47.

IV.

That at that hearing a Mr. Otwell testified that he is the part owner of a construction company and that in 1975 his construction company paid Rodney Dale Reeves $12,673.00 for his services to that company. Mr. Otwell further testified that from January 1, 1976 to October of 1976 Mr. Reeves had already been paid $12,479.00 for services to the company. This amount did not include a $1200.00 payment made in the past month to Mr. Reeves. The total of these payments over the last two years was $26,352.00.

V.

That at that hearing Mr. Rodney Reeves testified that that amount of money received had not been diminished by any State or Federal taxes due to the fact that he had not filed returns on any of those sums.

VI.

That at that hearing Mr. Reeves testified that he was the owner of seven automobiles.

VII.

That Mr. Rodney Reeves obtained a divorce in November

of 1975 and at that divorce was represented by paid legal counsel. That as a result of the agreement of the divorce Mr. Reeves is under no child support obligations whatsoever.

WHEREFORE, petitioner requests that the Court schedule a hearing on this matter and that publically paid legal counsel be denied Mr. Reeves in his case.

Respectfully submitted,

Charles Karr
Prosecuting Attorney
By: /s/ Ron Fields
Ron Fields
Deputy Prosecuting Attorney

APPENDIX "C"

IN THE MUNICIPAL COURT OF
SEBASTIAN COUNTY, ARKANSAS

FORT SMITH DISTRICT

STATE OF ARKANSAS — PLAINTIFF

VS.

RODNEY DALE REEVES — DEFENDANT

ORDER

On this 28th day of October, 1976, comes before the Court the petition of the State of Arkansas. The Court finds the petition for a hearing on the indigency status of Rodney Dale Reeves should be honored and, therefore, Rodney Dale Reeves is hereby ordered to appear before the Fort Smith Municipal Court at 10:00 A.M., on Monday, November 1, 1976, to show cause why the services of the Public Defender should not be denied him.

IT IS SO ORDERED.

/s/ Lawson Cloninger
Lawson Cloninger
Municipal Judge